United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

To be argued by
MARTIN LASSOFF

76-7184, 85

United States Court of Appeals

FOR THE SECOND CIRCUIT

Action No. 1.

THOMAS J. CHIARELLO,
Plaintiff-Appellee-Appellant,

—against—

DOMENICO BUS SERVICE INC. and HENRY GIRDWOOD,
Defendants-Appellants-Appellees.

Action No. 2.

ANGELA CHIARELLO,
Plaintiff-Appellee-Appellant,

—against—

DOMENICO BUS SERVICE INC.,
Defendant-Appellant-Appellee,
and
HENRY GIRDWOOD,
Defendant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR PLAINTIFFS-APPELLEES-APPELLANTS

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Introductory Statement

The above entitled actions were tried jointly before Judge Charles M. Metzner and a jury and the jury returned a verdict in favor of defendants. Action No. 1 was brought to recover damages for personal injuries sustained by plaintiff, Thomas J. Chiarello when a passenger car being operated by him on the access road leading to the Bayonne Bridge in New Jersey was standing still and a bus owned by defendant, Domenico Bus Service, Inc. and operated by defendant, Girdwood, ran into the rear of said passenger car. It was claimed that defendants were negligent. Action No. 2 was brought to recover damages sustained by plaintiff, Angela Chiarello for loss of consortium by reason of the injuries sustained by her husband, Thomas J. Chiarello, claimed in Action No. 1. Federal jurisdiction was based on diversity of citizenship.

Plaintiffs made post trial motions to set aside the verdicts for judgment N.O.V. or for a new trial and the Court granted the motions setting aside the verdicts on the ground that they were against the weight of the evidence and granted a new trial.

The new trial resulted in a judgment in favor of plaintiff, Thomas J. Chiarello in the sum of $669,910.00 against the defendants in Action No. 1 (1430a). The jury brought in a verdict in plaintiff's favor and answered questions to them (1426a). In answer to Question e, the jury found the damages for future pain and suffering to be $230,000.00. The Court discounted said amount by 3½% for 32 years, which resulted in an amount for future pain and suffering of $137,048.00, which discounted amount is part of said sum of $669,910.00.

The new trial resulted in a judgment in favor of plaintiff, Angela Chiarello, in the sum of $79,703.00 against the defendant, Domenico Bus Service, Inc. in Action No. 2. The action against defendant Girdwood was dismissed as to him in this action because he was never served with process. The jury brought in a verdict in plaintiff's favor and in answer to Question i, found damages for future loss of consortium to be $70,000.00. The Court discounted said amount by 3½% for 32 years, which resulted in an amount for future loss of consortium of $41,703.00, which discounted amount is part of said sum of $79,703.00.

Defendants made post trial motions to set aside the verdict on the grounds of excessiveness and contrary to the weight of the evidence and these motions to set aside the verdicts were denied.

Defendants now appeal from the order of the District Court setting aside the verdicts in the first trial and from an order denying defendants' motion that Judge Metzner disqualify himself from presiding at the re-trial, which motion was made after the granting of plaintiffs' motions for a new trial.

Plaintiffs' cross-appeal from the orders entered by the District Court discounting the damages for future pain and suffering of plaintiff, Thomas J. Chiarello in Action No. 1 and the method used by the Court in such discounting, and appeal the discounting of the damages for future loss of consortium of Angela Chiarello in Action No. 2 and the method used by the Court in such discounting.

Position of Plaintiffs

Judge Metzner did not abuse his discretion in setting aside the jury verdict in the first trial and by granting a new trial; that there was no reason for Judge Metzner to disqualify himself from presiding at the re-trial of the actions, and defendants had a fair trial; that there was sufficient medical proof causally relating plaintiffs' injuries to the accident in question and so the verdicts in the second trial were not excessive.

On plaintiffs' cross-appeal they take the position that the jury's verdict for future loss of consortium and future pain and suffering should not have been discounted and the judgments should be corrected accordingly.

The Evidence

On June 30, 1972 at about 6-6:30 P.M. a bus owned by defendant, Domenico Bus Service, Inc., operated by defendant, Girdwood, one of its employees, ran into the rear of a passenger car owned and operated by plaintiff, Thomas Chiarello in New Jersey on the access road leading to the ramp of the Bayonne Bridge. It is undisputed that: (1) Plaintiff's car was standing still at the time of the occurrence waiting for traffic ahead. (2) The front of the bus struck plaintiff's car squarely in the rear. (3) The force of the collision propelled plaintiff's car into the car ahead. (4) That *plaintiff was not contributorily negligence* (32a).

The only evidence as to liability produced at the trial was the testimony of the plaintiff, Thomas Chiarello, the deposition of the defendant, Girdwood, and the testimony of said defendant.

Plaintiff's Testimony

Plaintiff testified that he made a left turn to approach the bridge (58a); that there was a railroad trestle with a dip or underpass beneath; that when you came up out of the dip you had an unobstructed view and approach to the ramp (59a); when he came out of the underpass he saw cars ahead of him with their taillights on and the car ahead of him was braking to a stop; he saw another car in front of that one just starting to go through a puddle of water (63a).

The car ahead of him stopped ¾ of a car length before the puddle and plaintiff came to a stop ¾ of a car length behind that car (about 10 feet) (63a-64a).

After plaintiff's car came to a stop he looked into his rear-view mirror and saw the bus coming out of the dip and coming hard. Plaintiff braced himself and was struck in the rear; the seat he was on collapsed backwards and he fell backwards and was prone when his car was driven into the car in front of him by the force of the impact of the bus on the rear; his car hit the car in front of him and he flew forward striking his head on the visor coming to rest with his arms wrapped around the steering wheel (64a-65a). As for the force of the collision,—"The rear was crushed on the car out when I was driven into the car in front of me his bumper and trunk had pierced my radiator and crushed it and there was water coming out. So the car could not be driven" (75a). Neither plaintiff nor the car in front of him had any difficulty in stopping (72a-73a). The dip in the road under the railroad trestle did not have an accumulation of water because it had excellent drainage there (283a).

On cross examination plaintiff testified that the road was only one lane at the place of the accident (193a); he was travelling 15-20 miles per hour when he first saw the brake lights of the car ahead of him (194a).

Defendant Girdwood's Deposition

On his deposition he testified that his bus was 8 feet wide and 38 feet long (374a) and at the point where the accident occurred, the road was 25 feet wide (376a). The accident occurred after the bus came out of a downgrade through a puddle (378a-379a). As to the location of the accident with respect to the underpass or dip, he testified:—

> "Q. How far had you gone beyond that dip when the accident occurred? A. Approximately 25 feet" (378a).

He testified that before he entered the dip in the road the nearest car in front of him, plaintiff's car, was 75 feet (379a). At this point there was only one lane of traffic being used (379a-380a). He testified:

> "Q. When did you first notice the car in front of you start slowing or stopping, if you noticed that? A. About 50 feet in front of me when I saw the car in front of him apply his brakes first (379a).
>
> Q. How fast were you moving before you saw the other cars apply their brakes, apply their brakelights? A. About 25 miles an hour" (380a).

When he saw the cars apply their brakes, he applied his also but not with full pressure because they had gone through water (380a).

Defendant never changed lanes at any time nor did he attempt to.

> "Q. So at no point since you first saw the cars in front of you apply their brakes did you change lanes? A. No, sir" (381a).

He struck plaintiff's car straight on, his front bumper striking plaintiff's rear (381a-382a). He ran into the car ahead at 20 miles an hour. He did not know how many feet it would take him to stop his bus under the conditions prevailing going at 25 miles per hour as he had testified, but at 20 miles an hour it would take him roughly 50 feet (382a-383a). Interpolating those figures into 25 miles per hour it would take him roughly 62½ feet from the time he applied the brakes to the time he could stop.

After the accident he was able to continue to operate the bus on its regular run (385a).

Defendant's Testimony

Defendant testified at the trial that he was a bus driver for over 9 years and a truck driver 20 years. His workday started at 6:00 A.M. and with a break during midday, ended at 7:00 P.M. and at the time of the accident was on the last run to be completed at 7:00 P.M. (397a-398a). He was going at a speed of 25-30 miles per hour before he came to a dip in the roadway under a railroad trestle; he reduced speed going down in the dip because he knew that a puddle of water would be there and that the water was deep (416a-417a). This trestle was about 100 feet in width and had a pool of water 9 inches deep for a distance of about 25 feet (402a-403a). Defendant further testified (403a-404a)

"Q. Had you driven that area before this time? A. Yes, sir.

Q. Had you driven this area on prior occasions when it rained? A. Yes, sir.

Q. Will you tell this Court and jury what you observed at that dip underneath the railroad trestle on prior occasions when it rained? A. It was usually flooded.

Q. Sir, you drove this route, did you, every day? A. Yes, sir.

Q. For how long had you been driving that route? A. About two years.

Q. How many days a week did you drive that bus? A. Five days.

Q. Sir, after you went through the flooded area under the trestle, could you describe the roadway for us on that day? A. Wet.

Q. Was it level or did it go up? A. Inclined up.

Q. Could you tell us the degree or the type of inclining going up that there was? A. Very gradual."

He also testified (437a-438a):

"Q. It is part of your job to cross this Bayonne Bridge several times each day, is it not? A. Yes, sir.

Q. Incidentally, in that dip underneath that railroad trestle, aren't there sewer lines and drains? A. Yes, sir, that's where it floods. The sewers get clogged up.

Q. And there are no sewer lines or drains along the rest of the roadway, are there? A. No, sir.

Q. So that when you were operating your bus you knew it was quite likely that your bus would go through pools of water? A. Yes, sir.

Q. Did you also know if was quite likely that those pools of water might affect your brakes? A. Yes, sir."

He testified that plaintiff's car was 75 feet in front of him in going down the underpass and he saw him go through the flooded area and followed him (406a). When he saw the brakelights go on on the vehicles ahead of him he applied his brakes, at which time he was about 60 feet from plaintiff's car and he was travelling at 20 miles an hour. Thus, he was asked on direct examination (409a-410a):

"Q. How far away from Mr. Chiarello's car were you when you put on your brakes? A. About 75 feet, maybe—

Q. What?— A. 75, 60.

Q. Allright, at what speed were you going? A. At 20 miles an hour.

Q. Would you tell us what happened, what relation to your vehicle at that point? What happened? A. It started to slide. The wheels locked and the *vehicle would not stop on account of the wet roadway.*

Q. Did your brakes operate properly? A. Yes, they did."

He placed the accident at 75-100 feet past the trestle (407a). After the accident both taillights on plaintiff's car were broken. The bumper and trunk was dented and he saw water leaking from his radiator (412a-413a).

He admitted he was a professional driver and was fully aware of the effect of rain and weather on vehicle and its operator and testified (426a-427a):

"Q. As a matter of fact as an employee of the Domenico Bus Service, Inc., do they give you certain instructions with regard to safety in operating buses in difficult weather conditions? A. Yes, sir. They do.

Q. What are the instructions or what were the instructions as of June 30, 1972. A. Not following close.

Q. Not following close? A. Yes, sir."

At 20 miles per hour he travelled 30 feet per second figured at the mathematical formula for moving vehicles at 1½ feet per second for each mile of speed (427a-428a).

He testified that going at 20 miles an hour on dry pavement it would take him 50-60 feet to stop his bus and it would take 70 feet on wet pavement (433a-434a).

He also testified that in addition to this stopping distance required, when he saw the brake lights go on on the vehicles ahead it took him a second to a fraction of a second to take his foot off the accelerator or gas peddle and change it to the brake (431a) and a second at 20 miles an hour represented a distance travelled of 30 feet.

Judge Metzner's Opinion Setting Aside The Verdict and Ordering A New Trial

In his Opinion (643a-644a) Judge Metzner set forth the distance between defendants' bus and plaintiff's car, the speed of the bus and the distance it would take to stop the bus on this wet roadway. When you add this stopping distance to the distance his bus would travel during the time it took the driver to move his foot from the accelerator to the brake, it became obvious, physically, and mathematically, that the bus was so close to the car that at the rate of

speed of the bus, the collision had to occur. The facts referred to in the Opinion were all testified to by the defendant.

There were variations in his testimony (also see Girdwood's examination before trial (372a et seq.)) with differences in space, distance and speed but these likewise show mathematically that the bus was too close to the car ahead to be able to stop timely under the best of circumstances.

The Judge, using a stricter standard then is required on such motion for a new trial (giving the defendants the more liberal interpretation of the bus driver's testimony) concluded that in view of the conditions of the roadway and the speed at which the driver admits he was going, showed that the "situation was just too close", i.e., the situation being the position of the bus as situated in relationship to the car ahead. The Court concluded that the jury finding that the bus driver was not negligent is against the weight of the evidence and must be set aside.

It should be noted that there is no invasion of the jury's prerogative in determining this motion. There is no question of credibility of a witness here. The Judge came to his conclusion based on the testimony of the defendant bus driver only and the admissions contained therein.

The defendants in their brief not only misinterpreted the finding of Judge Metzner and his meaning as expressed in his opinion, but they repeat and reiterate such misleading interpretation as to befuddle and confuse the issue. At no time did the Court state that the whole situation was just too close for the jury to resolve. To the contrary, the Court specifically said that the jury was wrong in failing to find

the defendants negligent. From the bus being too close to the car ahead, the defendants would have one believe that it was just too close for the jury to resolve (page 31, Defendants' Brief). They also re-worded it differently by stating that the Court believed that the issue of defendants' negligence was just too close. That is simply a distortion. How far can one get from the meaning of the opinion and the facts referred to therein (643a, 644a). To this misinterpretation the defendants added an additional conclusion which is without basis, namely, that Judge Metzner held that the verdict of the jury in favor of the defendant was against the weight of the evidence solely because "we cannot plot with accuracy what happened". The opinion does not state that but does set forth that the basis of the decision was that the bus driver was proceeding too close to the car ahead in view of his speed and the conditions prevailing and that there were variations in his testimony.

Not content with this misinterpretation, defendants then, at page 39 of their brief, state that the lower court, in its view of the evidence, found the issue of defendant's negligence too close and concluded that regardless of how close that issue was, it was one of fact for the jury. Thus, we have a complete circle of falacious reasoning.

The Court found that the defendant bus driver had testified to his speeds and distances travelled and the distance he would have to travel before bringing his bus to a stop and the arithmetic involved clearly showed that the accident became inevitable in view of the closeness and speed of the bus. The negligence of the bus driver in placing himself too close to the car ahead was the cause of this accident. By inserting words and phrases into the opinion

expressed by the Court the defendants have deliberately misconstrued and misinterpreted the meaning of the opinion and are now asking the Circuit Court to draw the conclusion that since the jury could not find negligence based on the Judge's statement and it was too close for the jury to determine that question, plaintiffs' case should be dismissed. This is obviously wrong.

Although the question here is whether Judge Metzner abused his discretion in granting a new trial, the defendants now say that since the Judge did not say that there was a miscarriage of justice a new trial should not have been granted. It is submitted that implicit in the holding of the lower court there was a miscarriage of justice here. Not only was the plaintiff free from contributory negligence, admittedly so, but he was standing still. The defendant bus driver was the one in motion, knew the roadway because it was his bus route, and even knew when there would be a puddle of water in the road and when there would not be one; he knew not to travel too closely to the car ahead because he was told not to do so by his employer and he also knew or should have known the motor vehicle statutes and regulations appertaining which required him not to travel too closely, and yet with a reckless disregard for others on the road so operated his vehicle as to cause the accident.

The defendant's make much of a story that the bus's wheels locked (or blocked as set forth in the EBT) in going through the puddle of water. If that were so, it even raises a question as to whether the vehicle was properly maintained and was suitable for use on that highway. Such testimony is not even in the nature of a defense, but merely an explanation to show that after the bus driver placed

himself in a position where others were endangered he tried to avoid the accident but did not and could not succeed. His negligence occurred actually before he had to try to avoid the accident he precipitated. Had he kept his distance, particularly in view of the condition of the roadway which he knew about, both because of his observation and because of his years of experience on that route, the accident could not have occurred. By his closeness to the vehicle ahead and his speed, as well as the distance it would take him to stop his vehicle, it didn't make a difference any more whether his wheels locked, blocked or didn't lock. Even assuming that his wheels did not lock and he did not skid, he was so close, by his own testimony, that he still would have run into the rear of plaintiff's vehicle.

Parenthetically the brakes did not fail and there was nothing wrong with the wheels. A fair reading of the testimony shows that the meaning of the words "the wheels locked" is simply that when the brakes were applied he skidded on the wet surface. That comes from careless application of the brakes and the driver knew that and that is why he testified on his E.B.T. that he applied his brakes "but not with full pressure because he had gone through water". He also testified that when he applied the brakes the vehicle started to slide and "the vehicle would not stop on account of th wet roadway". This is not an unavoidable accident but negligence in the manner of operating a vehicle in view of the condition prevailing.

The failure by the Court to mention the words "miscarriage of justice" does not mean that that was not within the contemplation of the Court. As a matter of fact, other things were not mentioned by the Court which were set

forth in plaintiffs' motion papers. For example, the Court did not mention plaintiffs' requests to charge which was rejected out of hand and which defendants refer to in their brief when claiming that common law negligence would apply and no statutory negligence would be applicable since plaintiffs did not file requests to charge timely. In that connection it should be pointed out that before the trial plaintiff did submit requests to charge found at page 1415a-1416a. In addition, there was submitted at the time the Rules and Regulations of the Port of New York Authority. The Court rejected same on the ground that he felt the New Jersey law applied and not Port of New York Authority. The Court then stated at page 44a, "Make sure you've got all the New Jersey law in front of me before I charge the jury". Before charging the jury plaintiff submitted the Requests to Charge found at pages 1417a to 1418a. The Court forgot that leave was given at the beginning of the trial to submit the Jersey law, as set forth above, before charging the jury but rejected such Requests to Charge since they were brought in "when I am ready to charge the jury" (607a). The result was that no reference was made to any traffic rules or regulations that apply to the area.

It would appear that in the interests of justice the Court, for this reason alone, should have set aside the verdict and ordered a new trial and had the Court not taken such action plaintiffs would have appealed and this Circuit Court would have ordered a new trial because of the omission to charge the applicable law.

To avoid the consequences of the formula that a vehicle going at a constant given speed travels roughly 1½ times

its speed per second, defendants seek to limit the application "to ideal road conditions". First-mathematically and from a physical point of view, the length of a mile divided by time to travel is constant. Secondly, the additional distance covered in our case because of this formula, in endeavoring to stop the bus, occurred while the driver was moving his foot from gas pedal to brake and applying the brake—all before his wheels "locked" and/or the bus skidded.

The Applicable Law

Rule 59 of the Federal Rules of Civil Procedure permits the Trial Court to order a new trial for any of the reasons for which new trials have heretofore been granted by law.

The following are the pertinent excerpts from 6A Moore's Federal Practice:

> "The grant or denial of new trials in the Federal Courts have continuously been pursuant to common law precedents and the practice in the Federal, not the State, courts". (59.04 (1) p. 59-14.)
>
> "The motion for a directed verdict and the motion for judgment N.O.V. in accordance with the motion for a directed verdict each asserts that there is no genuine factual issue and that on the disputed facts the Movant is entitled to judgment as a matter of law; * * * . A motion for a new trial, on the other hand, may invoke the exercise of the Trial Court's discretion to grant a new trial on the ground that prejudicial error has been committed in the trial of the action; * * * that the verdict is inadequate or excessive; or that, although the evidence was legally sufficient to take the case to

the jury so that a directed verdict was not justified, the verdict is against the weight of the evidence". (59.04 (5) p. 59-19-20.)

"The Trial Court's power to grant a new trial is broad and ample to the end that an unjust verdict should not stand; and, when the power is wisely used, it prevents a miscarriage of justice and makes jury trials instruments of justice, without the slightest invading of the common law function of juries or constitutional right of jury trial". (59.08 (1) p. 59-102-103.)

"* * * a motion for a new trial is addressed to the sound discretion of the Trial Court; and the grant or denial of a motion for a new trial is not reviewable, except where the Trial Court acts under the compulsion of a mistake of law, * * * or where the Trial Court fails to exercise its discretion, or where it abuses its discretion, and a motion for new trial on the ground that the verdict is against the weight of the evidence and the Trial Court's ruling thereon are within the foregoing principles." (59.08 (5) p. 59-154-155.)

There are certain standards to be used by the Court in the exercising of its discretion.

"On such a motion it is the duty of the judge to set aside and grant a new trial, if he is of opinion that the verdict is against the clear weight of the evidence, or is based upon evidence which is false, or will result in a miscarriage of justice, even though there may be substantial evidence which would prevent the direction of a verdict". *Aetna Casualty & Surety Co.* v. *Yeatts,* 122 F.2d 350 quoted in 6A Moore's 59.08 (5) p. 59-158.

If the Court does exercise its discretion "it's error in granting or denying the motion, if any, is usually one of fact and non-reviewable. Under unusual or special circumstances, the Trial Court's action may constitute an abuse of discretion and be reviewable; but rarely can this be shown". (59.08 (5) p. 59-162-163.)

The decision of the Trial Judge is to be deemed "prima facie correct and final; and that only in the rare instance when it can be said that he has clearly erred, i.e., abused his discretion, will he be reversed". (59.08 (6) p. 59-175.)

The case of *Compton* v. *Luckenbach Overseas Corporation,* 425 F.2d 1130 (2 C.A. 1970), cert. den. 400 U.S. 916 is particularly in point and is being analyzed in some detail as it answers substantially the claims made by defendants in their brief on this appeal. In that case judgment was for plaintiff and motion for judgment N.O.V. or a new trial was made and denied. The issue was the credibility of plaintiff since plaintiff claimed he slipped on a ladder injuring his knee. He testified his shoes became slippery because of excessive oil drippings in the engine room, but this was disputed by defendant's witness. Plaintiff also had a prior injury to his knee and an accident report signed by him showed that he reported a recurrence of pain and swelling arising out of the prior injury. The jury chose to believe the plaintiff. The Circuit Court stated that the issue of credibility is out of place in determining a motion for judgment N.O.V. and there was sufficient evidence to go to the jury. However, they also refused to grant a new trial since the verdict was not against the weight of the evidence. The Court cited *Portman* v. *American Home Products Corp.,* 201 F.2d 847 (2 C.A. 1973), quoting Judge

Learned Hand, "There may be errors that are not reviewable at all, and among those that are not are erroneous orders granting or denying motions to set aside verdicts on the ground that they are against the weight of the evidence. * * * (This rule) is too well established to justify discussion" (p. 1132 n.2). The Circuit Court went on to say, "Moreover, without in any way suggesting that we would prefer to modify that rule, we note that Judge Mansfield's holding was within the permissible range of his discretion and we should not reverse simply because he exercised it one way rather than the other" (pp. 1132-1133). The reference in this quote pertains to the finding by the Trial Court that the defendant's evidence was overwhelming yet denied the defendant's motion.

The Circuit Court further quoted from *Creagh* v. *United Fruit Co.*, 178 F. Supp. 301 (SDNY 1959), as to the proper standard to be applied by the Trial Judge on a motion for a new trial,—namely, that the judge exercising mature judicial discretion should view the verdict in the overall setting of the trial; consider the character of the evidence. the legal principles the jury was to apply and "abstain from interfering with the verdict unless it is quite clear that the jury has reached a seriously erroneous result. The Judge's duty is essentially to see that there is no miscarriage of justice. If convinced that there has been, then it is his duty to set the verdict aside; otherwise not" (p. 1133).

As to the standard to be applied by the Appellate Court on reviewing the lower court's exercise of discretion, the opinion stated that they did not feel justified in assuming that the Trial Judge did not apply that standard referred to in the previous paragraph and sustained the lower court.

Even the dissenting opinion of Circuit Judge Moore states that "On appeal we should defer to the Trial Judge's evaluation of the weight of the evidence" (p. 1134). The dissent at p. 1134 quoted from Professor Wright's treatise on Federal Courts: "It has long been understood that if the Trial Judge is not satisfied with the verdict of the jury, he has the right—and indeed the duty—to set aside the verdict and order a new trial".

In *Boeing Company* v. *Shipman,* 289 F.2d 507, 5 C.A. 1968, the Court denied a motion for a new trial on the ground that the verdict was against the weight of the evidence. The Circuit Court held the standard to be applied by the Trial Court on a motion for a new trial to be as follows:—It is addressed to the Trial Judge's discretion which is extremely broad and he may grant a new trial in his discretion, irrespective of error, and merely because he does not think the verdict right. He may grant one "because he thinks the verdict is wrong, though supported by some evidence". The exercise of discretion is not ordinarily reviewable on appeal though an abuse of discretion may be corrected. The Court stated at page 514 "When should an Appeal Court reverse the District Court for abuse of discretion in the denial of a motion for a new trial which was based on the ground that the verdict was against the weight of the evidence? * * * the discretion of both the Appeal Court and of the Trial Court should be exercised to nullify a seriously erroneous result and to prevent a miscarriage of justice".

In *Simblest* v. *Maynard,* 427 F.2d 1 (2 C.A. 1970), the verdict in plaintiff's favor was set aside by the Trial Court on a motion for judgment N.O.V. Although the standard

for granting such motion is different and much stricter against the moving party than is required to be used in determining our case, it is pertinent to our appeal in the methodology and reasoning used in the Circuit Court in arriving at its decision. There they upheld the granting of the motion. There was an intersection collision between a fire engine and plaintiff's automobile. Although witnesses testified that there was a siren blowing and a red light flashing, plaintiff testified that he did not hear the siren or see the light; that he was three-fourths of the way through the intersection when he saw the fire truck 12 feet away; the defendant testified he was travelling 20-25 miles per hour. Under the State statute if sirens are blowing or lights flashing, vehicles are required to stop. Failure to stop is negligence. The Circuit Court found that mathematically he would have had one-third of a second to see the truck before the collision. As in our case the basis of the computation was that the vehicle moves approximately 1½ times its rate of speed each second (see footnote 6 on page 6 for the application of this fact and explanation by the Circuit Court that in view of the variances of speeds an arithmetical mean was arrived at by adding the two computations and dividing by two.) The Court held it was too short a period of time for him to observe the truck to be able to tell if the light was flashing and so his testimony that he did not see the flashing light had no probative value. The Court stated, page 6:

> "(5) Plaintiff's testimony that he did not see the fire engine's flashing red light, in the teeth of the proven physical facts, we hold is tantamount to no proof at all on the issue. O'Connor v. Pennsylvania Railroad Company, supra, at 915. As one commentator has put

> it, '. . . the question of the total absence of proof quickly merges into the question whether the proof adduced is so insignificant as to be treated as the equivalent of the absence of proof.' 5 Moore, supra, at 2320."

Plaintiff also complained of the judge's refusal to charge *res ipsa*—that defendant could have avoided the accident by going around plaintiff. The Circuit Court concluded "that at the rate of speed the truck was going and because of the closeness of the two vehicles, it was impossible for the truck to make a maneuver to go through" space to avoid the accident. (In our case because of the speed the bus was going and because the bus was too close to the car ahead the defendant had placed himself in the position where he could not maneuver to avoid the accident he precipitated.)

The Trial Court in our case, in the exercise of its discretion, and rightly so, set aside the verdict as being against the weight of the evidence. Judge Metzner is an experienced judge not prone to treat jury verdicts lightly. He was aware of the applicable case law and the standards required since the motion to set aside the verdict and the papers submitted in opposition set them forth. The decision was rendered after considerable deliberation.

The glaring fact here is that defendant driver's testimony and admissions are the basis for the decision. Plaintiff was standing still and the bus ran into him. The bus driver was the active party and plaintiff the passive one. Credibility of witnesses does not arise here. Though the defendant driver told variations of the story of how it happened, whichever version is accepted shows defendant to be negli-

gent and justifies the setting aside of a verdict in defendants' favor.

Obviously the Court did not abuse its discretion.

The cases cited by defendant are not applicable,—either they are weak cases, credibility of witnesses are involved, or plain invasion of the jury's prerogative to judge between conflicting witnesses' stories. It should be noted for example that in *Duncan* v. *Duncan* (6 CA) cited by defendants, the defendant didn't testify at all; in *Berner* v. *British Commonwealth* the Court pointed out that juries determine disputed evidence and inferences—but that is not our case; in *Massey* v. *Gulf Oil Corporation* (5 CA) the Court pointed out that in reviewing a ruling on a new trial motion they must also defer to the Trial Judge and the Appellate Court must find that the Trial Judge *clearly* erred. The defendants' brief fails to state that the Circuit Court upheld the lower court stating they could not say the court abused its discretion.

Judge Metzner did not abuse his discretion in our case. Had he not ordered a new trial there would have been a miscarriage of justice.

Plaintiffs make no comment with respect to defendants second Point in which they urge that Judge Metzner should have disqualified himself on the retrial—other than to point out that they did have a fair second trial and they don't claim otherwise.

Although defendants' brief contains a number of pages setting forth their version of the testimony in the second trial with respect to liability, no analysis is being made here of such testimony as it appears to be irrelevant to the

issues raised on this appeal. The defendants have distorted the record and set forth so many things that are seemingly not pertinent that their motives have become obscure and suspect. If it is to confuse, why the second trial in such detail? In groping for an understanding, the only possible conclusion one could arrive at is that this appeal is frivolous; that it is being pursued because of a dispute that has arisen between the primary carrier and excess carrier of the defendants (see copy of report annexed hereto marked Appendix A which has been filed by the attorneys for the primary carrier in this appeal); that in some manner or form they hope that this appeal and this Court will give them a basis for salvaging their position vis-a-vis: the excess carrier, by reason of a claimed default under their contract. This Court should not lend itself to such an intent or countenance same.

The Claimed Basis for "Excessiveness" is Nonexistent

Defendants contend that the "testimony falls short of establishing a proximate causal connection between the accident of June 30th 1972 and the scarring or adhesions found by Dr. Gervin and Dr. Leone at the time the hemilaminectomy was performed on December 2, 1973"; that likewise there was no causal connection between impotency claimed and the accident (p. 45 Defendant's brief). Therefore, the jury's verdict was excessive (p. 42 Defendant's brief).

Thus, if there was testimony as to causal connection the defendants are admitting that the verdict was not excessive.

The defendants tried this case attempting to show, *unsuccessfully* that the scarring and adhesions as well as the herniated disc were conditions plaintiff had prior to the accident and came about by the work he performed or physical activity engaged in.

Plaintiff Thomas Chiarello was 35 years old on the date of the accident of June 30, 1972. He was married, his wife being 30 years of age, and he had 3 children—2 girls aged 10 and 5 and a boy 9 years old. He was working as a terminal superintendent for Universal Terminal & Stevedoring Corp. at the Bayonne Military Ocean Terminal and was there in charge of the loading and unloading of trucks, lighter operations, railcar operations, all extra labor on the pier and maintaining the safety of the pier. When he came out of the U.S. Air Force in 1961 he received a superintendent's license and a hiring agents license. He was at that time employed as a ship superintendent by American Stevedores. After a year of that work (in 1962) he was elevated to full pier superintendent in charge of the whole pier and continued to perform such work until November 1967 when American Stevedores was absorbed by Universal and he became an employee of Universal as terminal superintendent. He continued in that capacity from said date to the time of the accident. His work included some clerical work, "walking and manual labor, sir, and thinking." Some of the work was strenuous (918a-924a). He worked at this steady, responsible position with authority for 11 years until the accident in 1972 and since then he has been unable to work and is permanently so disabled.

Until the accident of 1972 he had never injured or hurt any part of his body and had no trouble with his back, neck, right arm, right leg or any other part of his body except

for some high blood pressure and a hiatus hernia diagnosed in August 1973 which he was unaware of till then. He has not had an accident since (740a, 925a).

When the bus hit his car which was standing still, he was forced backwards against the back of the seat; the safety lock on the seat snapped and the back of the seat fell flat, he falling flat with it. The force of the bus hitting his car drove the car into the back of the car ahead and he was propelled upwards into the visor and draped over the steering wheel (692a).

He tried to reach his doctor the next day, but the doctor was out of town over the weekend. He stayed in bed until Monday, came under the care of a doctor whom he told of severe pain in the neck, right shoulder, right arm, hand and lower back. He received diathermy treatment and was sent to a neurosurgeon who prescribed a neck brace and sent him for physical therapy. He was under this doctor's care from July 1972 through November 1972 (701a-703a). He was also seeing the first doctor for the problem of impotency (704a). The first myelogram was taken in January 1973 because the pains in the neck, shoulder and low back became "very bad" and radiating "like somebody taking a very very hot knife and shoving it into your back and twisting it" (707a-708a).

By August 1973 plaintiff came under the care of Dr. Leone who testified that he, an orthopedic surgeon, found evidence of cervical sprain and disc protrusion of the lumbosacral area; that after conservative treatment a neurosurgeon was called in and both performed a laminectomy and excision of nucleus pulposis. When they went into his spine they found a protruding disc, an abundance of scar

tissue, the nerve roots of L4-L5 which go from the spine to the buttocks and legs were swollen. Following the operation, plaintiff went downhill with the same neurological, same type of pain and same type of findings as before the surgery. This was due to scar tissue reforming and/or a new herniated disc (816a-819a).

When the pains returned to his back and leg an electrical stimulator was tried but not successfully (820a) and a rhizotomy was performed. This is a procedure used where pain cannot be alleviated. Attempt was made to destroy the nerve fibres. Following this operation there was a slight change in pain. Then the pain he had been experiencing came back. When discharged from the hospital the record sets forth he had intractable back and leg pain.

A new myelogram was performed and indicated there was still a herniation present in the level of L4-L5; that there was too much scarring or a new disc and both were related to the original injury. The doctor would not operate again or recommend surgery because of the amount of scarring and the amount of damage that was in that area (822a-823a). He didn't expect any progress in plaintiff's physical condition (826a).

Since defendants attempt to cast doubt on the causal relationship of the scarring of the nerve roots to the accident, the following is significant. On cross-examination Dr. Leone was asked with respect to the nerve root scarring testified:

> "Q. Now, sir, can you tell us—when you tell us of this long-standing scarring, sir, with reasonable medical certainty can you tell us when that scarring actu-

ally commenced and took place in point of time? A. Approximately twelve days after an injury to this area.

Q. Sir, is it possible for a person to have an injury to the L4-L5 interspace, sir, and have scarring and that it does not really manifest itself until sometime thereafter? A. No.

Q. Is it possible, sir, that the scarring that you observed pre-existed the occurrence in 1972? A. No, sir" (837a-838a).

As for causation, the following was asked and answered:

"Q. With regard to the scar tissue, that marked adhesions and scar tissue you found on going into Mr. Chiarello's spine and which you said was of long duration, when you say of long duration do you mean that it anteceded this accident, or was after the accident? A. In this case?

Q. In this case. A. In this case I would say I was talking approximately the time of the accident.

Q. And was it competently produced with reasonable medical certainty by this accident? A. Yes, sir" (873a).

It was his "professional opinion" that since the nerve roots coming out at the level in the area involved and lower stimulate and control sexual functions, an injury at that level causes impotency on a physiological basis (821a).

Dr. Friedman testified he saw him in June 1973 and received complaints with reference to upper back and neck pain with pain radiating into the right shoulder and right arm and fingers of right hand; he had numbness and paresthesia into the hand; also pain in lower back region radi-

ating into right hip, buttock, right thigh and leg with numbness paresthesia, pins and needles. He had complaints of headaches, nervousness and anxiety and he complained of sexual impotency. He walked with a right sided limp and had to use a cane. All movements of back were painfully restricted. There were symptoms of compression of the nerve roots. He found he sustained sprain of muscles of upper back with irritation of the nerve roots; he had a slipped or herniated disc at level L4-L5. He suggested an operation. With the passage of time he felt that pain would increase with a herniated disc because as you get increasing amounts of nucleus pulposis squeezing out you get more pressure on the nerve; a swelling and enlargement of the nerve, and then have "the formation of scar tissue, an adhesion in the area of the nerve, and that causes pain and that progresses to an increasing degree" (755a-763a).

Dr. Friedman read the operative chart which reports a hemi-laminectomy had been performed on December 5, 1973 and the disc removed at L4-L5. The more significant finding "was that there were marked adhesions and scar tissue of the nerve root over the disc and it was necessary to free up the nerve root in order to approach the disc" and to remove it (964a-965a). Once adhesions and scar tissue are present in the spine they can't remove it because they will reform all over again (766a). Plaintiff, in January 1976 continued to have symptoms previously found—pain in low back, right-sided limp, dragging the right foot, muscle spasms in back; restriction of movement with pain; increase of pain travelling into the right hip, buttock and thigh indicating involvement of the nerve root; also numbness, loss of sensation and feeling in the right foot and leg (768a-770a). Further operations were not advisable be-

cause of adhesions (773a). "Intractable" pains plaintiff was suffering with is unrelieved continuing pain—and rhizotomy is the last procedure you would use in the case of intractable pain where there is no control of the situation (775a-776a). He found his condition worse in January 1976 then when he saw him in June 1973 (777a).

On cross examination Dr. Friedman testified that the scarring and adhesions found at L4-L5 area when they operated, "existed sometime after 1972, when he had his slipped disc situation:

> "Q. Doctor could it have preceded that? A. No, sir.
> Q. In your opinion it could not? A. No, in my opinion no" (789a).

He testified that the operative report describes the nerve root when seen to be markedly adherent with scars and the nerve root was frayed. He also testified that the myelogram of December 3, 1973 showed extradural defect in the region on both sides—right and left. That nothing was done for the left side (799a). He also stated that it was not possible to have an injury to a disc as a result of twisting or blows that did not manifest itself until later.

Dr. Kaplan, whose qualifications were conceded by defendants, testified that at the time of the removal of the disc herniation there was also present marked epidural adhesions which means scar tissue usually the "result of slight bleeding at the time of original injury which then forms scar tissue in the same area where there is a disc protrusion" (1075a).

That in July 1975 because of intractable pain and the failure of the rhizotomy to be effective he underwent

another myelogram and it showed a persistent defect on the same level but it was not clear whether this defect was on the basis of a recurrent protrusion of a disc or scar tissue (1077a). On examination in January 1976 he found him depressed, irritable, pain and limitation of motion of the neck wth spasms; limitation of motion and pain in the back, weakness of the right foot and toes; diminished sensation right upper extremity; he limped; and other and multiple painful and disabling symptoms (1080a-1083a).

> "It was my opinion that this patient continued to have a major problem involving his low back with continued muscular and nerve root symptoms on both sides but especially involving the right lower extremity. And this was secondary to the disc protrusion and to the multiple scarring of the epidural space and around the nerve roots which were found at the time of operation. In my opinion this was secondary to his injury. And he still had these difficulties" (1090a).

In his opinion another "operation to remove a disc was fraught with the danger of lack of success and even increasing symptoms" because of the scarring around the nerve roots "and this cannot be removed adequately surgically" (1091a). The doctor continued:

> "In addition to—he also had had a neck injury and had residual symptoms related to his neck. I did not feel this was the prominent problem at this time although he still had some problems involving the right upper extremity, but as far as his back was concerned and in spite of all of the treatments, including rhizotomy, he has still an intractable pain and, therefore, a guarded prognosis. I can't see that there is any relief

for him in sight in terms of medication other than strong, very strong, analgesics or narcotics. As a result of his chronic and intractable pain significance, it was my opinion that he had developed rather chronic emotional reaction with anxiety and depression—Not infrequently seen in patients who have had prolonged disability and physical complaints. This was compounding his difficulty and was exhibited on examination by some findings which were related to his emotional state rather than to the underlying physical state.

Essentially that was my opinion. He did have a potency problem, as I indicated before. It was my feeling that this was related to his anxiety and depressive reaction, his emotional reaction, his ability to perform" (1091a-1092a).

He felt that the potency problem was largely psychological but a psychological problem is as real to a patient as a physical problem (1092a).

Describing the type of pain plaintiff is suffering with:

"The type of pain he has is call[ed] radicular or nerve root pain, and this tends to be a combination of dull aching and sharp shooting pains, very often associated with a burning quality, and very uncomfortable. Root pain is perhaps one of the most uncomfortable pains. *Perhaps the only other pain that is more uncomfortable is a severe precordial pain when one has acute coronary which can be quite bad,* but I would say root pain is perhaps one of the more severe pains that the body has to endure" (1094a).

A hypothetical question was submitted to the doctor (1094a-1095a) in which among other things was recited acute tortocollis and lumbosacral derangement, a herniated disc, cervical radiculitis; "that he was operated on at the Golden Isles Hospital in Hallandale, Florida, in December, 1973, and a right hemilaminectomy was performed and the surgeon reported the findings that you have told us about. *In addition to removal of a nucleus pulposis he found marked adherent scarring*".

> "In your opinion, Doctor, with reasonable medical certainty, was this accident a competent producing cause of those injuries? A. In my opinion, it was" (1095a-1096a).

Obviously "injuries" included scarring in that context.

With respect to the inability to tell the length of time the scarring persisted, Dr. Kaplan emphasized that

> "On the basis of the history in this case of him having been symptom free, that is, not having symptoms reference to his back and nerve roots, and following this injury having progressive symptoms with the finding of scarring some six months later or seven months later, whatever it was, I would say it must be considered as related to his injury. There is no evidence that it existed before.
>
> Q. What I am saying, Doctor, if it had existed before, wouldn't the man have been aware of it and complained about it before? A. I would say he would have been aware of pain, not aware of adhesions or a disc protrusions, but he would have been aware of pain had he had this problem prior to an injury.

Q. And the fact that there were no complaints of pain and no medical treatment prior to this accident, is that compelling proof to you that this accident was the cause of this injury? A. Yes, the history in this case is that this accident caused it.

Q. Doctor, with regard to the problem of impotency, Mr. Chiarello has testified here that he is able to attain an erection but that in the course of the sex act it is necessary for him to move and at that point his pain causes him to lose that erection.

In your opinion, Doctor, would that be a fair medical description of his condition? A. Yes, I would say that would be fair" (1129a-1131a).

The latter portion pertaining to the effect of pain on sexual activity is exactly the description given by plaintiff of the effect of movement and pains on his attempts at cohabitation (917a).

Thus there is causal relationship testified to between the accident and the scarring and the herniated disc, the impotency and hence the basis of defendants' appeal falls.

It should also be remembered that defendants moved to set aside the verdicts on the grounds of excessivenes and this motion was denied (1412a, 1435a, 1428a). What was said earlier in this brief of the exercise of discretion by the trial judge is equally applicable here. Where a trial judge has approved a verdict this court in *Myers* v. *Town of Harrison,* 438 F.2d 293 (2CA 1971) quoted (at p. 298) the Supreme Court as follows:

"Only when there is a complete absence of probative facts to support the conclusion reached does a revers-

ible error appear. But where, as here, there is an evidentiary basis for the jury's verdict, the jury is free to discard or disbelieve whatever facts are inconsistent with its conclusion. And the appellate court's function is exhausted when that evidentiary basis becomes apparent, it being immaterial that the court might draw a contrary inference or feel that another conclusion is more reasonable."

See also *Ressler* v. *States Marine Lines, Inc.,* 517 F.2d 579 (2CA 1975).

The defendants' position on causal relationship and hence excessiveness is not well taken. The jury verdict in the 2nd trial should not be reduced or disturbed.

The Jury Awards for Future Pain and Suffering and Future Loss of Consortium Should Not Be Discounted

Plaintiffs appeal from the orders entered herein on March 11, 1976 and the judgments entered therein (1427a-1430a; 1433a-1435a; 1438a):

(1) Insofar as they order and provide for the discounting of damages found by the jury as to future pain and suffering for Thomas Chiarello and future loss of consortium for Angela Chiarello (1426a), and

(2) From the manner employed by the Court in doing the mathematical computations for such discounting.

It is submitted that there should have been no discounting of such items of future damages as found by the jury

and this Court should modify said orders and judgments on direct the lower court to enter corrected judgments containing the amounts of the damages found by the jury as to all items of damage except for the loss of future earnings and as to that, the lower court's discounted amount be included in said judgment.

Both of these orders and judgments recite that counsel agreed that questions be submitted to the jury to determine the various items of damage and "the calculation of the total damages was reserved to the Court ".

The jury had been charged that the law recognized "the principle of the present value of a dollar, which is recognition of the fact that a lump sum of money received today is worth more than the same amount of money paid in installments over a period of time". That although the jury usually makes the mathematical computations, counsel have agreed with the Court that "the Court will make the necessary computations based on your answers to the questions" (1394a).

During deliberation the jury in effect wanted to know if they could do the discounting of the gross damages for future loss of earnings consisting of an annual loss of earnings of $19,500.00 for twenty-six (26) years. In response to the jury's note, the Court instructed them that with respect to Question 'b' pertaining to future loss of earnings, "the way we framed it is for you to give us gross figures and I will do the working out for you, because there is a formula involved that gets complicated" (1405a).

When the jury brought in its verdict the Court stated: "Pursuant to our agreement with counsel I will work out

and show to counsel my computations based on those figures" (1409a).

Parenthetically, in the first trial the Court charged the jury that counsel had agreed that the jury need only answer the questions submitted to them. "The Court will make the necessary computations based on your answers to the questions" (598a).

Implicit in this agreement by counsel permitting the Court to do the necessary arithmetic based on the jury's answers is that the Court would discount only those items of damages which are usually discounted and are proper to discount, and as to those items, the method used be fair.

The Trial Court's reference in its charge to the present value of the dollar being less than the same amount of money to be paid in installments over a period of time appears to be based on the theory of discounting as expressed in *Chesapeake & Ohio Ry.* v. *Kelly,* 241 U.S. 485, 491 which holds, "In short, that when future payments or other pecuniary benefits are to be anticipated, the verdict should be made on the basis of their present value only".

The Supreme Court in *Sealand Services Inc.* v. *Gaudet,* 414 U.S. 573 said that loss of society which is part of loss of consortium includes love, affection, care, attention, companionship, comfort and protection, as well as a broad range of mutual benefits each family member receives from the other if he were not injured; that such a loss is not a pecuniary loss.

Nor do our present-day social concepts permit the acceptance of a holding that such loss of consortium evaluated in terms of money be treated as anticipated payment of a

pecuniary benefit. The elements of consortium are not and should not be treated as a pecuniary benefit with a value divisible equally by the number of years of the lifetime of the members of the family. To treat such damages on a par with anticipated payments for future earnings is offensive to our social concepts of the family unit consisting of a unity of humans with ties of love, affection, sex and the like.

This Court has already stated that when there is a lump sum award for future pain and suffering, such award is not discounted. *Yodice* v. *Koninklijke Nederlandsche Stoomboot Maatschappij,* 443 F.2d 76 (2 C.A. 1971 cert. den. 411 U.S. 933) which cites *Rapisardi* v. *United Fruit Company,* 441 F.2d 1308 (2 C.A. 1971).

Also see *Ressler* v. *States Marine Lines Inc.,* 517 F.2d 579 (2 C.A. 1975) (in which separate amounts were awarded the plaintiff for past and future pain and suffering as in our case but not discounted) and *Mormackite Claims,* 295 F.2d 692 (2 C.A. 1961).

If damages for future pain and suffering are not discounted surely damages for loss of consortium should be treated similarly.

The Court discounted the awards for future loss of consortium and future pain and suffering by dividing the gross amounts by 32 (years life expectancy) assigning an equal amount to each of the 32 years.

Plaintiffs' family involved consists of, respectively, husband and wife, now aged 39 and 34 respectively, and three children aged 14, 13 and 8. Their life in every aspect was disrupted completely and permanently, not only putting

great strain on both plaintiffs because of the impotency, but because of the great burden placed on Angela Chiarello to care for her husband (and having to give up her employment) and to assume the complete care in the bringing up of her children and in being both mother and father to them. The jury apparently took this into account in determining damages as indicated by their asking, during deliberation, for the ages of the children. Obviously the burden she shouldered was and will be much greater during the children's minority than 32 years hence; obviously, likewise, are the results and ill effects of the impotency which will be greater during the plaintiffs' younger years than when they are near or at 70 years of age.

These lump sum awards do not lend themselves to discounting from a mathematical point of view and is offensive too our social concepts. The courts recognize, even in the situations involving future loss of earnings, that the manner of discounting must be fair. See *Rapisardi* v. *United Fruit Company, supra* and *Mormackite Claims, supra.* Since it is impossible to allocate a uniform value of such losses to fixed periods of time where a lump sum is awarded, there should be no discounting of these awards as such an exercise would be too speculative.

It should be noted that in New Jersey where the accident occurred, the courts held that future pain and suffering should not be discounted nor should a jury be required to attempt to reach a verdict by dividing the life expectancy into yearly periods setting down yearly estimates and then reducing the estimates to their present value. "The arbitrariness and artificiality of such a method is so apparent that to require a jury to apply it would, we think, be

absurdity." *Botta* v. *Brumer,* 26 N.J. 82, 96, SC NJ 1958 quoting from *Chicago and N.W. Ry. Co.* v. *Chandler,* 283 F. 881, 884 (8 C.A. 1922).

The gross awards for future pain and suffering and loss of consortium should not have been discounted and the judgments entered herein should be modified accordingly.

CONCLUSION

1. The orders entered by Judge Metzner setting aside the jury verdicts in the first trial and granting plaintiffs a new trial are not erroneous and the judge was not abusing his discretion.

2. The orders entered by Judge Metzner denying defendants' request that he disqualify himself are not erroneous and should be affirmed.

3. The verdicts in favor of plaintiffs in the second trial should be affirmed in all respects.

4. The orders of Judge Metzner in Actions No. 1 and No. 2 by which the damages for future pain and suffering and future loss of consortium were ordered should be modified so as to leave the jury verdicts unaltered and judgments entered pursuant to said orders be modified to reflect no discounting of future pain and suffering and future loss of consortium.

Respectfully submitted,

MARTIN LASSOFF
Attorney for Plaintiffs

MORRIS CIZNER,
Of Counsel.

United States Court of Appeals
For the Second Circuit

----------x

THOMAS J. CHIARELLO,

Plaintiff-Appellant-Appellee,

- against -

DOMENICO BUS SERVICE INC., and
HENRY GIRDWOOD,

Defendants-Appellants-Appellees
- x

ANGELA CHIARELLO,

Plaintiff-Appellant-Appellee,

- against -

DOMENICO BUS SERVICE, INC.,

Defendant-Appellant-Appellee,

- and -

HENRY GIRDWOOD,

Defendant.

----------x

REPORT FOLLOWING PRE-ARGUMENT CONFERENCE

Docket No. 76-7185
76-7187

TO: Nathaniel Fensterstock, Staff Counsel, United States Court of Appeals for the Second Circuit, U.S. Courthouse, Room 1804, Foley Square, New York, N.Y. 10007

In accordance with the request at the Pre-argument Conference:

☐ Enclosed is a stipulation dismissing the appeal.

☐ A stipulation dismissing the appeal has been signed and forwarded for signature to the other attorney(s), and on completion will be delivered to you in Room 1804.

My client has decided:

☐

APPENDIX A

[X]

Other: As appeal counsel for Daniel J. Coughlin, the attorney of Record for the Defendants-Appellants-Appellees in the above-entitled actions, I renew the offer made at the conference held on May 3, 1976, to contribute the sum of $500,000.00, which is the coverage of the primary insurance carrier, toward any settlement that may be effected in these actions. If the cases cannot be settled because of the unwillingness of the excess insurance carrier to contribute the difference between this amount and the amount demanded by the plaintiffs, Mr. Coughlin's office is prepared to continue the prosecution of the appeals it has taken on behalf of the Defendants-~~Appellants~~ Appellants herein.

Counsel to Daniel J. Coughlin, Attorney for

Attorney for William F. McNulty

(x) **Appellants** - ~~Appellees~~, Domenico Bus Service, Inc., ~~(x) Respondent~~ and Henry Girdwood.

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cc: MARTIN LASSOFF, ESQ.
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A.M. LAQUAQLIA
18 Rector St., Newark, N.J.07101

Dated: May 4, 1976

Return by [illegible] 1976

AMT 51

Service of three (3) copies of the within
is admitted this 26 day of AUG. 1976

Daniel J. Coughlin
Atty for Dept - Appellee

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